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# In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 80

LOEW'S, INCORPORATED, RADIO - KEITH - ORPHEUM  
CORPORATION, RKO RADIO PICTURES, INC., ET  
AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA<sup>1</sup>

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 3504-3563)  
is reported in 66 F. Supp. 323, and its findings of

<sup>1</sup> Together with No. 81, *Paramount Pictures, Inc., et al.*, appellants v. *The United States of America*; No. 82, *Columbia Pictures Corporation, et al.*, appellants v. *The United States of America*; No. 83, *United Artists Corporation*, appellant v. *The United States of America*; No. 84, *Universal Pictures Company, Inc., etc., et al.*, appellants v. *The United States of America*; No. 85, *American Theatres Association, Inc., et al.*, appellants v. *The United States of America, et al.*; No. 86, *W. C. Alfred, et al.*, appellants v. *The United States of America, et al.*, all on appeal from the District Court of the United States for the Southern District of New York.

fact, conclusions of law and decree (R. 3659-3701) are reported in 70 F. Supp. 53.

#### JURISDICTION

The judgment of the district court was entered on December 31, 1946 (R. 3694). Timely motions of all defendants to amend the findings of fact, conclusions of law and judgment were ruled upon on February 10, 1947 (R. 3719-3720). Petitions for appeal were filed by Loew's, RKO, Fox and Warner Brothers on February 26, 1947 (R. 3726), by Paramount on February 26, 1947 (R. 3738), by Columbia on February 6, 1947 (R. 3751), by United Artists on February 20, 1947 (R. 3766), by Universal on February 20, 1947 (R. 3788), by American Theatres Association, Inc., et al. on February 25, 1947 (R. 3812-3813), and by W. C. Allred, et al. on February 28, 1947 (R. 3816). The appeals were allowed on the same day the petitions were filed (R. 3737, 3751, 3762, 3767, 3804, 3819) except for the appeal of American Theatres Association, Inc. et al., which was allowed on February 26, 1947 (R. 3811-3812).

The jurisdiction of this Court is invoked under Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823, 36 Stat. 1167, 15 U. S. C. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. C. 345). In Nos. 80-84, this Court noted probable jurisdiction on June 23, 1947 (R. 3840). In Nos. 85 and 86, this Court, on the same

day, postponed further consideration of the question of its jurisdiction to the hearing of the cases on the merits (R. 3841).

#### QUESTIONS PRESENTED

1. Whether the trial court properly found that the defendants conspired with each other to fix admission prices and playing positions, and that each defendant distributor conspired with its exhibitors to fix admission prices.

2. Whether the trial court properly found that pooling arrangements pursuant to which theatre interests of the major defendants were combined with those of independent exhibitors violated the Sherman Act.

3. Whether the trial court properly found that Paramount, Columbia, and Universal violated the Sherman Act by conditioning the licensing of one copyrighted film upon the licensing of another.

4. Whether the trial court properly held that the master agreements and franchises made by Universal and United Artists violated the Sherman Act.

5. Whether the relief granted by the trial court was an appropriate means of terminating the violations referred to in the preceding questions.

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\* The trial court found that United Artists did not engage in this practice. The other defendants do not appeal from the court's findings and judgment in this respect.

\* The other defendants do not appeal from the court's findings and judgment in this respect.

6. Whether the trial court properly terminated the system of arbitration established by the 1940 consent decree.

7.\* Whether certain exhibitors were entitled to intervene below or here for the purpose of being heard in opposition to the competitive bidding provisions of the judgment.\*

#### STATUTES INVOLVED

The relevant provisions of the Sherman Act (Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. 1, et seq.) and of the Copyright Act (Act of March 4, 1909, 35 Stat. 1075, 17 U. S. C. 1) are set out at pp. 3-5 of the brief for the United States in No. 79, this Term.

#### STATEMENT

The facts are fully stated at pp. 5-46 of the brief for the United States in No. 79, this Term.

#### SUMMARY OF ARGUMENT

The appeals of six of the eight defendants assume that they have violated the Sherman Act, but all eight insist that the violations found below were more extensive than those they committed and that some or all of the relief granted should be set aside. Undisputed documentary evidence supplied by them shows that all eight were guilty

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\* Paramount, Columbia, Universal and United Artists attack the competitive bidding provisions in the judgment below. For our argument in this respect, see pp. 54-89 of the brief for the United States in No. 79, this Term.

of the precise forms of trade-restraining conduct found by the court below. *Interstate Circuit v. United States*, 306 U. S. 208, shows that such conduct violates the Sherman Act and is unsanctioned by the Copyright Act. The provisions of the judgment appealed from are no broader than necessary to terminate the violations found and the only abuse of discretion below lies in the failure of the trial court to grant the relief sought on the Government's appeal.

## I

All of the distributor defendants deliberately and with substantial uniformity used film licensing restrictions as a means of controlling and suppressing competition among theatres in selling the product of all to the public. This suppression was accomplished by an abuse of privileges granted by the Copyright Act. The Sherman Act would have been clearly violated by this use of copyright license restrictions even if they had not been used to give special protection to the theatres affiliated with the five major defendants. As the court below found, the net result of the conspiratorial use of these restrictions was the imposition of a system of fixed admission prices and theatre playing positions which benefited all eight distributors in all areas. However, the system also conferred special benefits upon the affiliated theatres in the areas where they operated

and upon the large independent circuits in the areas where they operated.

The theatre pooling arrangements among the major defendants and between them and others were a striking manifestation of the suppression of competition inherent in the general conspiracy, but the trial court's judgment that such arrangements alone represented illegal theatre ownership arbitrarily cut off the major defendants' liability in a manner extremely favorable to them.

The findings as to illegality of the defendants' franchises, master agreements and seasonal block booking contracts are challenged only by the non-exhibitor defendants. The findings are sustained by agreements made by these defendants which, on their face, have precisely the same trade-restraining effects as those made by the other defendants. Their complaint is really that the prohibition of the future use of such restrictions works a hardship on them because such restrictions are necessary to counter-balance the market control of the major defendants resulting from their theatre affiliations.

## II

All of the defendants, except Columbia, attack the prohibitions against price-fixing, systems of clearance, and the use of clearance to do anything more than give the licensee restrictive privileges which could be justified as reasonable under Sherman Act standards. A mere statement

of the prohibitions attacked is adequate to show that they are necessary to prevent the continuance of the precise conspiracies and individual licensing practices found illegal below. Their validity therefore rests upon the validity of the findings discussed above.

The major defendants complain of the judgment against their theatre expansion, not upon the ground that it should not be subject to some judicial control, but upon the ground that the control should permit them to expand as a means of protecting their investments or entering a competitive field. To do this would be to sanction a continued expansion of the power to discriminate inherent in their vertical integration. Their assumption that their power to discriminate should be subject to continuous judicial regulation in this suit implies that continued possession of that power carries with it a continuing threat of discriminatory treatment of competitors in violation of the Sherman Act.

The complaint of the non-exhibitor defendants as to the judgment below is founded principally on their claim that since the major defendants may force their films into the market by the use of their affiliated theatres, the distributors without affiliated theatres are compelled to use franchises, block booking, and master agreements to force their films into the market. Since the judgment will terminate their privilege of securing an ade-

quate share of the market by conspiracy with the major defendants, their complaint has practical merit. However, the only way to meet this objection by any judgment in this suit is not an exemption which will permit the continued use of illegal practices by them, but the adoption of provisions which will terminate the major defendants' illegal power. The net effect of all the appellants' arguments is to show that adequate relief in this suit requires the termination of that power by divorcement and cross-licensing relief, as shown in the Government's main brief.

## ARGUMENT

### I

The court below correctly concluded that all of the defendants had individually and collectively violated the Sherman Act in the manner found

#### Introduction

The manner in which this case was tried and the limited nature of the assignments of error on which most of the defendants rely show that the issues raised by their appeals are extremely narrow. We shall therefore summarize the kind of evidence in the record and the precise nature of their attacks upon the findings before answering their arguments.

1. *How this case was tried.*—The Government's case consisted of (1) an exposition of the corporate structure of each defendant (see App. pp.

446-462);<sup>8</sup> (2) the general manner in which the major defendants' theatre holdings had been acquired, with a description of the extent and location of their individual and joint holdings (see App. pp. 207-255); (3) the express agreements, with each other and with other exhibitors, by which the major defendants pooled theatre operations in particular areas (see App. pp. 137-206); (4) the printed forms of agreements used by all the defendants in licensing films (see App. pp. 1-18), and representative executed written agreements by which they licensed each other and their affiliates upon terms which eliminated competition among themselves and which discriminated against others (see App. pp. 61-136); (5) tabulations of film rentals paid by theatres affiliated with the defendants to all distributors and film rentals received by the defendants as distributors from all domestic theatres showing a concentration of film receipts in the hands of affiliated theatres in the areas where they op-

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<sup>8</sup> The Appendix filed with our main brief contains a summary of documentary evidence sufficient to show the basis for the court's findings, since the printed record was prepared under a stipulation that no exhibits need be included in such printing (R. 8825). In view of the large number of exhibits, we have in some cases printed only excerpts from or digests of documents in evidence, and where statistical exhibits have been printed which are not self-explanatory, we have added a summary or recapitulation of such exhibits intended to show their significance in the case. Wherever such excerpts, digests, or additional matter is used, that fact appears upon the face of the Appendix.

erated and in the hands of all eight defendants as film distributors from exhibition throughout the country (see App. pp. 256-284); (6) tabulations showing the pattern of distribution of feature films of all eight defendants among the first run theatres in the principal cities of the United States (see App. pp. 299-308); (7) the particular restrictive provisions by which a substantially uniform run, clearance, and admission price structure in all of the principal cities was maintained (see Exs. 41, R. 173; 42, R. 173; 57-1-57-49, R. 185; 94, R. 203; 126-128 (R. 221, 222, 2159), 139-139B, R. 228, 2271; 144, R. 231; 365, R. 346; 369-1-369-6, R. 346, 347);\* and (8) arbitration and appeal board decisions under the consent decree disclosing a wide variety of discriminatory effects of the defendants' licensing practice upon specific independent exhibitors (see App. pp. 403-446).

\* These exhibits are interrogatory answers which show the clearance and admission price restrictions contained in licenses made by each distributor defendant for the exhibition of the first block of films released during the 1943-44 season by all exhibitors licensed on first run in cities of 25,000 or more, all exhibitors licensed on second run in cities of 50,000 or more, all exhibitors licensed on third run in cities of 200,000 or more, and all exhibitors licensed on fourth run in New York, Chicago, Philadelphia, Los Angeles, and Detroit. All of these exhibits are now on file with the Clerk of this Court, most in printed form. They are each so voluminous that no attempt was made to print or reprint any of them in the Appendix. An index of all the exhibits in evidence, with a general description of each, has been prepared by the Government and will be filed in printed form.

The defense consisted of extensive testimony of the defendants' executives and affiliated exhibitors intended to show that some of their theatre interests were acquired to meet competitive threats from others, that their theatre pools were created for operating efficiency or purposes other than to restrain trade in films unreasonably, and that their substantially uniform and discriminatory restrictive licensing practices were a product of business necessity rather than a specific intention to restrain trade. They also offered statistical data which did not contradict but merely amplified the plaintiff's statistical proof (see App. pp. 286-298, 339-361). Their principal executives also denied in general terms any specific intent to produce the discriminatory and exclusionary effects resulting from each distributor-defendant's individual licensing practice and also denied the existence of any unlawful combination or general conspiracy to produce these effects. They offered affirmative testimony to show that there was competition among all the defendants in their production activities and that the major defendants received substantial economic benefits from their theatre ownership.

From the foregoing summary of the evidence it will be seen that at no point was there any substantial conflict as to facts subject to objective proof. The question of whether or not the defendants violated the Act thus rests upon the

inferences to be drawn from evidence of basic competitive facts about their business largely supplied by them.

*2. Uncontested findings and conclusions.*—By their failure to assign error to many of the findings and conclusions, we must take as established on the major defendants' appeals the following facts:

Each of them has violated the Sherman Act, as a distributor, by agreeing individually with theatres affiliated with other defendants and with large circuits to grant unreasonable clearance (conclusion 8 (e), R. 3693), by making master agreements and franchises with such licensees (conclusion 8 (f), R. 3693), and by individually conditioning the offer of a license for one or more copyrighted films upon acceptance by the licensee of one or more other copyrighted films (conclusion 8 (g), R. 3693).

All five majors attack conclusion 9 (d), that as exhibitors they have violated the Sherman Act by "Conspiring with the distributor-defendants to discriminate against independent competitors in fixing minimum admission price, run, clearance and other license terms" (R. 3693). However, the error alleged is in failing to make this conclusion read "Conspiring with the distributor-defendants to receive discriminatory license privileges as found in Finding No. 110 above" (R. 3735, 3748). The license privileges described in Finding No. 110 are contract provisions which

discriminate "against small independent exhibitors and in favor of the large affiliated and unaffiliated circuits" (R. 3681). These privileges are suspension of contract liability while a theatre remains closed, large film selection and elimination rights, film rental deductions where double bills are played, move-over, extended run and road-show privileges, underage and overage (the practice of using excess film rental earned in one circuit theatre to fulfill a rental commitment defaulted by another), unlimited playing time, exclusion of foreign and independently produced pictures, and the right to question the distributors' rental classification (R. 3681).

Thus their appeals assume that each has, as an exhibitor, made license agreements with other distributor-defendants and has, as a distributor, made license agreements with other exhibitor-defendants which discriminate against competing licensees and that such discriminations violated the Sherman Act.

Columbia attacks only the findings of fact (R. 3753, 3756) and conclusions of law (R. 3759) relating to block booking and blind selling. It thus assumes upon its appeal that it was correctly found to have violated the Sherman Act by conspiring with the other distributor-defendants and with its licensees to fix theatre admission prices generally and by discriminating in favor of the affiliated circuits and large independent circuits.

United Artists (R. 3767-3786) and Universal (R. 3789-3804) attack all of the findings that show a violation of the Act by them.

Since all of the defendants except Columbia challenge the court's findings of a general conspiracy among them as distributors to fix admission prices and playing positions of competing theatres, and a conspiracy between each of them and their licensees to fix their relative admission prices, we shall first show that the conspiracy findings were correct and then show that the particular defendants challenging other findings of individual unreasonable restraints by them were also correctly found to have violated the Sherman Act in these respects.

A. Each distributor-defendant was correctly found to be a party to a horizontal conspiracy to fix admission prices and playing positions of competing theatres and to be a party to a vertical conspiracy between it and its licensees to fix admission prices.

The court below found a horizontal conspiracy among all of the eight defendants, as distributors, to fix the admission prices and playing positions of all competing theatres by restrictive license provisions which controlled the run on which each theatre was to play, the minimum admission price which it should charge for that run, and the intervals between runs in competing theatres (R. 3670-3673). The trial court also found a vertical conspiracy between each distributor-defendant and its licensees to fix the admission prices of theatres competing with each other in exhibiting each dis-

tributor's films (R. 3672). This result was accomplished by precisely the same license restrictions which were used to effectuate the horizontal conspiracy.

The court inferred the existence of the horizontal conspiracy among all distributors from their substantially uniform application of license restrictions in dealing with the same theatres (R. 3670) and a discriminatory application of those uniform restrictions in dealing with theatres affiliated with the defendants and with other large circuits (R. 3674). The eight vertical conspiracies were based upon subsidiary findings that each of the competing licensees knew the admission price restrictions which were being applied to its competitors' theatres when its license was made and was therefore a party to the maintenance by the distributor of restrictions which regulated price competition among all theatres of a particular competitive area in exhibiting its films (R. 3681-3682).

As noted above (pp. 10-12), the defendants cannot successfully challenge the accuracy of these subsidiary findings, and their effort to overturn the court's ultimate conclusions must rest upon whether or not the court was justified in drawing its ultimate inferences of conspiracy from the undisputed facts on which they were premised. *Interstate Circuit v. United States*, 306 U. S. 208, expressly held that a conscious uniform application of admission price restrictions against in-

dependent competitors of a large circuit was itself a proper basis for finding a horizontal conspiracy among these distributors. Since the same case also sustained a holding that Paramount alone could not impose the same restrictions against other independent competitors of the circuit in other areas where they were not imposed by any other distributor, it was also a clear holding that independently of any conspiracy among distributors, the use of admission price restrictions by a single distributor to suppress price competition between theatres was also unlawful. That case, therefore, is alone conclusive on both conspiracy issues raised here unless it can be shown that the court's subsidiary findings which demonstrate that the purpose of their license restrictions was to control price competition (and are thus not sanctioned by the Copyright Act) are erroneous.

1. *The use by each distributor of license restrictions intended to suppress admission price competition between competing theatres is substantially undisputed.*—As pointed out in our main brief at pp. 98-101, the defendants' film licenses habitually impose explicit restrictions upon the use of their films, the effect of which is "to stipulate admission prices for theatrical entertainment to which their sole contribution is the supplying of a positive print on a rental basis. Since the stipulated admission price is generally the price charged by the theatre for all films, such price-fixing bears no relation to the quality of the

exhibition rights granted by any particular license. The elaborate series of restrictions on simultaneous or subsequent rental of prints of the same film to competing theatres, embodied in these licenses in the form of "run" and "clearance" or "protection" provisions are simply devices for fixing price differentials between competing theatres in order to maintain their relative playing position. Thus each series of such restrictions used by any single distributor is a system of price control in which each licensee consciously participates.

That such restrictions were used by each distributor to control admission prices of competing theatres appears on the face of clearance schedules in evidence. A clearance schedule which shows the manner in which the playing positions of all theatres in a large metropolitan area are related to their admission prices is Exhibit 369-6 (R. 347), a memorandum dated October 27, 1941, which sets out the clearance granted by United Artists to theatres affiliated with Paramount in Chicago and its suburbs. In this city, as disclosed in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U. S. 251, and by this schedule, the playing positions of all theatres are fixed for clearance purposes as first run downtown, "A" pre-release (4th, 5th and 6th week after first run downtown), "B" pre-release (7th and 8th weeks after first run downtown), "C" pre-release (9th week after first run downtown), 1st week of gen-

eral release (10th week after first run downtown), 2nd week of general release (11th week after first run downtown), etc. The admission prices governing these playing positions are set forth on the first page of this schedule as "'A' pre-release—Matinee 30¢—Evening 50¢—children at all times 15¢", with a separate schedule of admission prices for each playing position. Such a schedule merely illustrates in concrete form an obvious use of clearance as a device for controlling price competition among theatre operators.

That, in general, clearance intervals are geared to admission price differentials was tacitly admitted by defense witnesses Kupper (R. 1212-1213), Reagan (R. 718), and Keough (R. 951-959). Even though in many first run contracts the applicable minimum prices were not inserted in the license contract, this was claimed to be inadvertent and there was still an implied agreement to maintain the established price (R. 1210-1211). The close relationship between such prices and clearance restrictions is also shown by the standard license provisions, which reduce clearance as a penalty for admission price reduction. See App. p. 2 (Columbia) Ex. 286; p. 6 (Fox) Ex. 276; p. 8 (Loew) Ex. 278; p. 18 (RKO) Ex. 282; p. 17 (Universal) Ex. 290; p. 11 (Paramount) Ex. 280.

Even if the evidence showed that each distributor had independently maintained such systems, it would have been guilty of a conspiracy with its licensees to violate the Sherman Act. See

*Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373. But the evidence shows that they also maintained such systems by agreement with each other.

2. *The substantially uniform use of such restrictions by the distributor-defendants in a discriminatory manner is also demonstrated by undisputed evidence.*—There is no dispute about the substantial uniformity of the application of the price restrictions in question by all the defendants in dealing with the same theatres. The defendants do challenge the court's finding of a horizontal conspiracy, upon the ground that the uniformity was simply a product of normal business methods desired by exhibitors. But even if it appeared that the system of admission price control described above had been uniformly applied without any intent to injure competition, it would illegally deprive the theatre-going public of the benefits it is presumed to obtain from price competition. See *United States v. Socony-Vacuum Co.*, 310 U. S. 150, 221-222. Moreover, as applied here, it was plainly intended to injure independent exhibitors as well.

The evidence here shows a discriminatory application of such price control which is a natural consequence of the dual interest of the major defendants in protecting their theatre operating profits as well as film rentals, in areas where their affiliated theatres operate in direct competition with independents. For example, the clearance schedules

agreed to by Fox, Columbia, Loew, and RKO for the exhibition of their films in Warner theatres first run in Appelton, Kenosha, Oshkosh, Racine, and Sheboygan, Wisconsin (Exs. 42, 139, 57—49, 94, R. 173, 228, 185, 203), provide that these theatres shall have clearance of 30 days over all others in those towns charging the same admission prices. The schedules go on to provide for clearances of 50 days, in the same situations, where the competitors' admission price is 5 cents less than Warner's and proceed to step up the clearance to 142 days in the situations where the theatres charge 35 cents less than the Warner first runs. On its face, a schedule of that character is plainly calculated to discriminate against Warner's competitors in those areas by establishing extensive clearance in favor of the Warner houses even where there is no admission price differential, and by expanding that clearance proportionately in cases where admission price differentials occur.

A similar discriminatory application of admission price restrictions occurs where the affiliated theatre is left free to fix its own price while the independent is controlled by a contract price. As Mullin, a Paramount partner, and Friedl, chief executive of one of its wholly owned exhibition affiliates, testified (R. 968, 999), the Paramount affiliates fix their own admission prices; as the exchange of letters between Mochrie of RKO and exhibitor Weiss of Macon, Georgia, showed, if one of these affiliated exhibitors (in that case Lucas

and Jenkins) chooses to reduce his prior run admission price to the same price as that charged by an independent playing on a following run, the independent protests in vain (Exs. 388, 389, R. 2236).

As shown by their interrogatory answers 6 through 11 (Exs. 41, 42, R. 173, Fox; Exs. 57-1 through 57-49, R. 185, Loew; Ex. 82, R. 196, Paramount; Ex. 94, R. 203, RKO; and Exs. 126-128, R. 221-222, 2159, Warner), in licensing their affiliated theatres the major defendants frequently enter into no formal contract, or if they do make a formal contract, the minimum admission price restrictions are frequently not filled in. Where the degree of affiliation is such that these theatres are in fact controlled by the major distributor in question, the terms of the agreements it makes with its own theatre affiliates are not decisive, in any event, but it is clear that this affiliation, in itself, provides an ever-present incentive for admission price discrimination. By leaving an affiliated theatre in a position where it could reduce first run prices to eliminate competition while independent competitors were at the same time held by their contracts to a fixed minimum price for the same films, the major defendants, as distributors, could, and did protect their own affiliates from normal price competition.

Opportunities for similar admission price discriminations were extended by one major de-

fendant to the theatres of another. This is shown by the general provision incorporated in the licenses made between the Warner circuit and Loew for the 1943-44 season, which gave Warner the right to reduce its first run admission prices as much as 25 percent, providing a 15 cent evening adult minimum was maintained. Similarly, in dealing with Fox in Los Angeles, Loew made an express agreement with Fox, contained in a letter agreement dated September 15, 1943, attached to the license contract for that season (Ex. 249, R. 276), which gave Fox the right to reduce its admission price "not more than (25%) or (\$.10), whichever is greater," below the September 1, 1940 price, provided that it did not go below \$.15 or the price charged by a competing theatre on a following run. The effect of such discriminatory application of admission price restrictions is simply to intensify in specific local situations the general discrimination implicit in a system of admission price control collectively administered by theatre-owning distributors.

The precise kind of admission price discrimination condemned in *Interstate Circuit v. United States*, 306 U. S. 208, was thus disclosed by this

\* This privilege was granted to Warner in the following towns: Bridgeport, Bristol, Hartford, Middletown, New Britain, New London, Stamford, Torrington, West Hartford, Connecticut (Ex. 57-8, R. 185); Washington, D. C. (Ex. 57-10, R. 185); Hagerstown, Maryland (Ex. 57-21, R. 185); Chicopee, Holyoke, Lawrence, Mass. (Ex. 57-22, R. 185); Charleston, Parkersburg, West Virginia (Ex. 57-48, R. 185).

record to be inherent in the major defendants' standard practice.\* The discrimination there resulted from compelling the independent theatres to increase their admission price to the 25-cent level maintained by Interstate's subsequent theatres, while permitting the latter theatres to maintain their run priority over the independent; precisely the same adverse effect on the independent's ability to compete results from permitting the circuit operator to drop his admission price to the independent's level while maintaining run priority. In either event, the independent theatre operator is prevented from adjusting his admission price to the value of the entertainment he offers and the public is deprived of the obvious benefits derived from competitive pricing of what it buys.

Clearance arbitration under the consent decree also demonstrated a uniform use by the major defendants of restrictions which discriminated

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\*The record in *Schine Chain Theatres, Inc. v. United States*, No. 10 this Term, also shows similar discrimination in favor of a large independent circuit. RKO points, at p. 63 of its brief, to a concession of Government counsel, made for the purpose of that case, that the court might assume these defendants' price-fixing restrictions to be lawful practices if employed in a reasonable manner. RKO's brief neglects to point out that notwithstanding the breadth of that concession, RKO and the other distributor-defendants here were found to have conspired with Schine to employ such restrictions in a manner which discriminated against Schine's smaller competitors.

\* See *Interstate Circuit* record, first appeal, Nos. 709, 710, Oct. Term, 1937, Vol. 135, pp. 141, 149, 174, 185, 196.

against independent competitors. Thus, in the *Matter of Bailey*, App. Bd. No. 24 (Ex. 2), the Appeal Board found that the Bailey Theatre in affiliated hands had played with clearance from all of the major defendants over the affiliated Kensington. When the Bailey passed to independent hands and the Kensington remained affiliated, the situation was reversed by four of the major defendants and the Kensington was given clearance over the Bailey. See App. pp. 406-407. Similarly, in Overton, Texas, where a Paramount affiliate failed to serve the town adequately, the townspeople built a new theatre. When the new theatre was opened, the Paramount affiliate, Jefferson Amusement Co., opened a second old theatre, played all the major defendants' films on first run, and compelled the new independent theatre to play a second run 60 days after its first run, notwithstanding that this theatre was compelled to charge as high an admission price as Jefferson's first run theatres (see App. pp. 444-446).

The defendants offered no rebuttal of the Government's proof of discrimination except by testimony that they had no general policy or agreement to discriminate between affiliated and unaffiliated theatres, independent circuits and small independent exhibitors.

While all of them were, of course, extremely well supplied with factual data in their own files as to what their practice has been in specific situations, as disclosed by agreements they actually

made with the theatres that licensed their films, none offered any executed license agreements or any summary of the terms of a group of license agreements made with the exhibitors of any particular class in any particular area to show that their performance measured up to their professions of a non-discriminatory policy. All except United Artists<sup>10</sup> relied merely upon proclamations by their chief sales executives that their policy was not to discriminate. Since the policy of all of them as it affects independent exhibitors is principally carried out in the field by persons whose testimony was not offered, that is to say, the exchange managers and salesmen (R. 681-682, 839-840, 1419-1420, 1312, 1055, 1468, 1505-1506, 1728, 534), there was little to be gained by testing these generalities through cross examination of the witnesses who were offered.

Under these circumstances, the production of unverified oral generalizations as to their performance, when concrete proof in documentary form as to what their performance has been was at hand, gave rise to the inference that the primary evidence in their control which they failed to offer was unfavorable to them. See *Interstate Circuit v. United States*, 306 U. S. 208,

<sup>10</sup> United Artists offered no testimony of any person who negotiated licenses with exhibitors, large or small. Lazarus, its contract manager, merely said that the contracts taken for the exhibition of United Artists' pictures passed over his desk (R. 1406-1407).

225, 226. In any event, the concrete evidence of discriminatory licensing practices offered by plaintiff could not be overcome by general protestations of a contrary policy. *Schroble v. Lehigh Valley R. Co.*, 62 F. 2d 993, 996 (C. C. A. 2). Cf. *Local 167 v. United States*, 291 U. S. 293, 298.

The evidence of the major defendants to the effect that there was no exchange of information between their respective distribution and theatre departments suggests that the conspiracy made it unnecessary to obtain information which, in a competitive industry, would be essential. Their sales executives testified that they are not advised as to data in their respective theatre department's files which is of vital interest to them as distributors in licensing their films, to wit, the terms on which their theatre affiliates deal with their so-called competitors in the film distribution field (R. 534-535, 688-689, 1109-1110, 1511, 1725)."

Only two defendants offered any explanation whatever of this odd alleged practice. Paramount attempted to show that this nonexchange of information was a consequence of a program of decentralized theatre operations, but Goldenson, the head of Paramount's theatre department and Reagan, its sales head, are not decentralized, as they are both located in New York (R. 666, 824). Their asserted nonexchange of data which would normally be vital to the efficient conduct of both

<sup>11</sup> Rodgers, Loew's sales manager, testified that he even sold Loew's own theatres as if he were a stranger to them (R. 436).

businesses cannot be explained in terms of decentralized theatre-operating policy, because Goldenson did receive summaries at New York of the general terms on which some of Paramount's 100% theatre affiliates licensed films from others (R. 839).<sup>12</sup>

Harry Warner said (R. 1559) that he operates the distribution and theatre-operating divisions of Warner Bros. Pictures, Inc. as separate departments because it is more efficient to do it that way. The record shows that he not only operates them as separate departments, but through separate corporations, which may be a more efficient form of operation than a single corporation would provide, yet it hardly explains the failure of the two "departments" to exchange data, which would normally be an extremely useful guide to efficient competitive behavior.

But, assuming their complete truth, the assertions as to the way the major defendants carry on their businesses are entirely inconsistent with any claim of genuine film licensing competition among them. The sales departments of these integrated business units may only close their eyes to this vital information in their theatre departments' possession as to what their alleged competitors

<sup>12</sup> According to Reagan, he has tried unsuccessfully to get this data from Paramount's theatre department, but has no interest in it (R. 690). In trying to explain this inconsistency upon questioning by the court (R. 690), Reagan conceded that if he knew that his competitors were getting better terms from Paramount's affiliates he could improve his own.

are currently doing and still operate these businesses with a decent regard for their stockholders, upon the assumption that they need not concern themselves with current competitive developments.<sup>13</sup> Such an assumption is entirely consistent with the absence of any significant changes in the general pattern of first run distribution of the defendants' pictures among the affiliated theatres during the past ten years pointed out in our main brief at p. 18. This stable pattern and this practice both confirm a working agreement among these defendants not to compete with one another in licensing films.

Under such conditions it is clearly unnecessary for the distribution and theatre departments of the major defendants to exchange currently the license terms data in their possession. Any serious conflict among the major defendants as to the

<sup>13</sup> It is also true that if Loew has furnished Fox with certified statements for ten years under its Washington, D. C. franchise (Ex. 188, App. p. 76), as to the terms on which Loew licensed its films in its own first run theatres, Kupper, the Fox general sales manager, has a fairly accurate idea as to what Fox ought to get for its films for first run in Washington in the same theatres without making inquiry of the Fox theatre department as to the terms on which it is licensing Loew's films. Thus, the failure to exchange information between the theatre department and the distribution department of a single integrated business unit may also be explained in terms of past exchange of information among the various distributor affiliates of these units. None of their sales executives denied such an interchange, their general denial of receipt of information as to other distributor's terms being carefully confined to current negotiations (R. 689-690, 1725, 436, 1511, 1109-1110).

terms they ought to get from each other may, and under the circumstances disclosed by this record, normally would be settled at the presidential level as they involve substantial policy rather than competitive considerations.<sup>14</sup>

In short, the documentary evidence of a concerted discriminatory suppression of independent competition was unrebutted and the defendants' affirmative testimony tended to implicate rather than exculpate them. The court below was clearly correct in finding that the entire run, clearance, and admission price structure was maintained by license agreements made by the defendants with each other and with theatre operators generally which were expressly calculated to discriminate against small independent exhibitors and to deprive the public of competitive pricing of the defendants' films.

B. The major defendants restrained trade in films unreasonably by pooling theatres with independent exhibitors

The major defendants all attack the provisions of the judgment dissolving theatre pooling arrangements between them and independent exhib-

<sup>14</sup> Harry Warner said that "if any question should arise which affected more than one department, the question should be cleared through me directly," (R. 1559). None of the major defendants' presidents claimed that both theatre operating and film distribution data was unavailable to or not examined by them. It was thus plainly usable in determining policies of these defendants toward each other and their competitors even if it had not been exchanged by the theatre-operating and film-distributing subsidiaries.

itors which involve ownership of stock in theatre corporations, and prohibiting the creation of similar arrangements in the future. This part of the court's judgment is limited to theatre corporations in which a defendant owns an interest of more than 5 and less than 95 percent and in which a "former, present, or putative" independent exhibitor owns a similar interest (R. 3699). It is thus expressly limited to those situations where a continuance of the relationship has a necessary tendency to protect the defendants against competition from persons who might otherwise compete with them in operating theatres.

These defendants make no objection to the provisions of the judgment which prohibit the continuance or creation of similar relationships by theatre leases or operating agreements (Pars. (2), (3), (4), Section III; R. 3698-3699), but they challenge the court's findings (Fdg. 67, R. 3671; Fdgs. 112-116, R. 3682-3683) which directly support those provisions since those findings also support the dissolution of the corporate relationships here involved. The pooling arrangements maintained by express agreement were ordered dissolved by July 1, 1947, and substantial compliance with this provision has already occurred. The defendants' position here thus comes down simply to a claim that they should be able to control potential price competition between themselves and independents through maintenance of

stock interests in theatre corporations, although such control is obviously unreasonable when maintained by express lease or operating agreement.

The propriety of the remedy adopted by the court to cure the illegality inherent in these corporate relationships is discussed in Point II, *infra*, at pages 56—60. It is sufficient to note here that the defendants also seek permission to justify the maintenance of such existing relationships by showing in this suit, at some future date, that such relationships will not unreasonably restrain competition.<sup>15</sup> The argument which follows is limited to showing that the court's conclusion that all of the defendants' theatre pools, whether maintained through express agreement or by stock interests, were an unreasonable restraint of competition (R. 3683, 3693), is amply supported by evidence which the defendants failed to rebut at the trial, despite adequate opportunity to do so.

1. *The Government's prima facie case showed that all pooling of theatre interests between the defendants and otherwise independent exhibitors had an unreasonable trade-restraining purpose and effect.*—The complaint challenged the legality of partial interests held by the defendants in theatres in which independent exhibitors were also interested and put them on notice that the

<sup>15</sup> See Paramount brief, p. 27; Fox brief, p. 31.

judgment might divest them of such interests." The Government proved as part of its case in chief the number and location of all theatres in which the defendants owned interests of any kind or degree, the names of the corporations through which they were held, and the extent of the defendants' interests in such corporations. The remainder of its case in chief showed that these and all other forms of theatre pooling in which the defendants engaged did more than merely eliminate potential competition between the defendants and independents involved. This evidence showed that they were created or maintained as a direct result of the major defendants' unlawful control of the playing positions and admission price policies of all independent theatres, described in the preceding section.

The direct connection between the major defendants' power to discriminate in supplying films and the creation of such relationships was amply demonstrated by the theatre pooling agreements, digested at App. 160-206. Thirteen of these

<sup>16</sup>The complaint charged that each major defendant was an illegal combination which, *inter alia*, had coerced independent exhibitors into "relinquishing control of their theatres or a share of the profits thereof" by express or implied threats to deprive them of access to its films (R. 3196-3197). Part of the relief sought against such combinations was that the defendants be divested "of all interest and ownership, both direct and indirect, in any theatres" which the court should find had been used to violate the Sherman Act. (Par. 7, R. 3200.)

agreements<sup>17</sup> involved otherwise independent interests. They show on their face that such pools restricted the independent parties' exhibition interests to particular areas (App. pp. 123, 163, 168), established joint control of the playing positions and admission prices of their theatres (App. pp. 122, 163, 164, 165, 166, 175, 176, 177, 178, 190, 191, 192), secured a share of the profits from their operations for the defendants (App. pp. 121, 163, 164, 165, 168, 177, 190, 192), and made films available to them which could not have been otherwise licensed from the defendants involved (App. pp. 121, 163, 165, 167, 175, 176, 190, 191).

The court's finding that these corporate relationships not only suppressed competition between the theatres immediately involved but were aimed at others outside the pool (Fdg. 113, R. 3682) is further supported by the use of the pooled interests in furtherance of the general conspiracy. The evidence shows that the same discriminatory advantages extended by the defendant-distributors to their own theatres were extended to their pooled theatres. Thus the "formula deal" between Paramount and Ever-

<sup>17</sup> Ex. 201, App. p. 162; Ex. 202, App. p. 165; Ex. 203, App. p. 167; Ex. 204, App. p. 168; Ex. 211, App. p. 174; Ex. 212, App. p. 176; Ex. 214, App. p. 178; Ex. 219, App. p. 183; Ex. 226, App. p. 190; Ex. 227, App. p. 191; Ex. 229, App. p. 192; Ex. 386, App. p. 119, and Ex. 387, App. p. 120.

green Theatres Corporation (50 percent owned by Fox) (Ex. 241, App. pp. 45-50) follows closely in form the "formula deals" made between Paramount and its own exhibitor partners (Ex. 399, App. pp. 125-126). These "formula deals" in effect allocate film rental among the various affiliated circuits covered by them, each circuit paying an arbitrary percentage of a film's national gross unrelated to the actual performance of the film in the theatres licensed.<sup>18</sup>

The pooling agreements in evidence together with the use of all theatre pools in furtherance of the conspiracy were properly regarded by the court below as decisive of the purpose and competitive effect of pooling arrangements which took the form of ownership by a defendant and an independent of a theatre owning or operating corporation. The same results were accomplished through such joint ownership without further agreement, but the operating agreements in evidence made the purpose and effect of all such arrangements crystal clear. The defendants were free to show at the trial, if they could, that there were exceptional circumstances which might rebut the presumption of illegality resulting from the defendants' demonstrated illegal creation and use of similar arrangements. They were unable to do so and the assertion in their briefs that such cir-

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<sup>18</sup> The percentages assigned to the various Paramount partners do not appear in the Appendix, but appear on the first page of Ex. 399, R. 2185.

circumstances may exist is hardly an occasion for relitigating their legality. No claim was made below that they had no fair opportunity to litigate that question at the trial and any such claim now has no support in the record.

2. *The defendants failed to rebut the Government's proof of the trade-restraining purpose and effect of these relationships.*—The defendants presented extensive testimony by some of the exhibitors involved in theatre pools with defendants which gave the complete history of these relationships (see Mullin, R. 962-985; Beatty, R. 1030-1042, 2489-2492; and Newman, R. 1999-2034). They also presented lengthy testimony of other exhibitors involved in similar relationships with them which showed the competitive position and physical characteristics of the theatres involved, but did not attempt to explain why the theatres were pooled. See Exs. P-25 (R. 1928); P-25A (R. 2492) (339 pages of affidavits, largely made by Paramount partners and their employees).

The history of all of the defendants' theatre acquisitions, of any kind, was covered by extensive testimony of defendants' theatre executives (R. 838-938, 985-1027, 1824-1826, 1966-1988, 2035-2132r), introduction of which was facilitated by a stipulation that affidavits might serve in lieu of oral testimony. No testimony offered by the defendants to justify their ownership of a total or partial interest in any theatre anywhere was excluded. The failure of this voluminous evi-

dence to show any legitimate need for the defendants' extensive joint ownership of theatres with exhibitors who might otherwise compete with them is shown by the complete lack of reliance upon such evidence in their arguments in support of their attack on the finding that such ownership constituted an unreasonable restraint. Where such evidence descended from mere statements of innocent intentions to specific reasons for the creation and maintenance of specific joint relationships, the justification was simply in terms of the obvious business advantages resulting from a cooperative operation of theatres in a particular community rather than a competitive one. The failure of the defendants to offer any evidence whatsoever to justify most of their pooling relationships, was itself a strong indication that any attempt to become explicit about the reasons for their creation and maintenance would have done the defendants more harm than good.

The trial court's conclusion that these relationships were a direct result of the defendants' power to discriminate against independents in licensing films and were intended to suppress competition of others, as well as between the parties, received affirmative support from defense witnesses. Upon cross-examination of those who gave oral testimony, the Government was able to show that, in a number of instances, the films of a major defendant were made available to an independent

theatre on first run only while a defendant owned an interest in it (R. 577-586, 955-959, 1221-1222).

In one instance, the acquisition of a partial interest in an independent theatre which followed such discrimination led directly to the creation of a closed town by acquisition of the remaining independent theatres (R. 1222).

The witness Thalheimer, the only exhibitor called by any of the defendants who was not involved in a pool of some kind with one or more of them, was apparently selected to show that an independent could thrive in opposition to affiliated theatres. He owns three first run and six subsequent run theatres in Richmond, Virginia, where Loew has a first run theatre of its own (R. 1379), and an interest in two other first run theatres (R. 486) operated by Wilmer & Vincent (R. 1379). Upon his cross-examination it appeared that Loew and Wilmer & Vincent had in 1940, through a corporation in which both were interested, threatened Thalheimer's subsequent run business by building one subsequent run theatre and half completing another (R. 1403). Whereupon Thalheimer paid Loew and Wilmer & Vincent \$6,800 each to abandon construction of the half-completed theatre (R. 1404). The pendency of this suit was apparently all that stood in the way of a settlement of that controversy by a transfer of an interest in Thalheimer's business instead of the payment of money.

Even as matters now stand, Loew and each of the major defendants has an accurate count of Thalheimer's receipts in all his theatres which play their films on percentage by virtue of elaborate auditing privileges specified in their licenses. See App. pp. 36-45 and Exs. 276, 278, 280, 282, and 284 (R. 273-274). In this respect they can and do obtain information, normally available only to shareholders, as to the business of every so-called independent theatre operator. The independence of any of these operators is dubious so long as they are faced with potential competition from vital sources of supply which have continuous access to the confidential details of their business."

The trial court, in any event, could not have recognized actual ownership by the major defendants of any theatre business in combination with independent exhibitors as a reasonable arrangement without ignoring completely their habitual use of advantages inherent in their vertical integration to control independent competition wherever it may exist, by all available means.

We believe that the trial court was clearly in error in failing to recognize all degrees of theatre ownership by the major defendants as continuing

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<sup>19</sup> In April or May of 1945, Columbia, Paramount, RKO, Universal, and United Artists formed an agency called "Confidential Reports, Inc." to perform for them this auditing and checking function (R. 1322). The entire stock of this corporation was owned by them at the time of the trial (R. 1323). It is now owned by those five defendants and Fox and Warner.

unreasonable restraints on competition, as shown at pages 90-119 of our ~~main~~ brief. When it restricted its findings of unlawful ownership to pooling arrangements in effect at the time of the trial it cut off liability in an arbitrary manner which was extremely favorable to the defendants. We respectfully submit that their claim that the line of demarcation between lawful and unlawful ownership was arbitrarily drawn supports the Government's argument for divorcement rather than their appeals.

C. The non-exhibitor defendants violated the Sherman Act by tying one copyrighted film to another through franchise agreements and seasonal block booking and by making master agreements:

Franchise agreements are film licenses which grant exhibition rights in a group of film copyrights which the licensor contemplates making available to the licensee over a period of more than one year (R. 3660). Block booking is the practice of licensing one copyrighted feature, or group of features, upon condition that the exhibitor shall also license another feature, or group of features (R. 3659-3660). Universal and Columbia customarily make a single license with each exhibitor for all of the films they intend to release over a one-year period, which the exhibitor contracts to exhibit. At the time either a single season agreement or a franchise is made, substantially all of the copyrights involved have not yet issued. Master agreements are film licenses which may cover exhibition rights in only

a single copyright but which fix blanket rental terms for an entire circuit of theatres (R. 3660).

The district court found that all of the distributor defendants had violated the Sherman Act by making master agreements and franchises with affiliated circuits and large independent circuits (R. 3693). It also found that each distributor-defendant, except United Artists, had violated the Sherman Act by conditioning the offer of a license for one or more copyrighted films upon acceptance by the licensee of one or more others (R. 3693). It accordingly enjoined these defendants from making franchises and master agreements and from conditioning the right to exhibit one feature upon the licensee's taking one or more other features (R. 3696).

As already noted, the only defendants which question the court's findings and injunction as to master agreements and franchises are Universal and United Artists. Universal and Columbia challenge the court's findings and relief as to block booking. Paramount objects to the block booking relief (R. 3746), but does not assign error to the findings on which it is based. Columbia and Universal insist that they did not in fact condition their film licenses in the manner found and also assert that such conditioning is not a violation of the Sherman Act.

Since a franchise is simply an extreme form of block booking, we shall treat the appeals of Universal and Columbia with respect to both franchises and block booking together and show that such practices involve not only a violation of the Sherman Act but a serious abuse of copyright license privileges as well. We shall then show the illegality of the master agreements made by Universal and United Artists.

1. *Block booking, in the form of franchises or otherwise, is a copyright licensing abuse which violates the Sherman Act.*—"The sole interest of the United States and the primary object" in granting a copyright is to receive "benefits bestowed by the genius and meditations and skill of individuals \* \* \*" *Fox Film Corp. v. Doyal*, 286 U. S. 123, 127. If the financial rewards to individual copyright owners are to serve their public purpose the reward of each owner must be directly related to the quality of his copyright. A single license which makes available exhibition rights in a large number of copyrights (most of which have not even been created) to an exhibitor upon restrictive terms uniformly applicable to all of them, is a form of license deliberately intended to equalize rather than differentiate the reward for the individual copyrights involved in the license.

An extreme example of a license which completely submerges the identity of a large group of miscellaneous copyrights in fixing exhibition

terms is the franchise, Ex. 261, printed at App. pp. 50-58. Interstate Circuit there agreed to pay a weekly rental of \$5,000 for the use of Universal's features, westerns, serials, and short subjects to be released during a three-year period. Such an agreement ties up a substantial segment of the playing time available in the circuit's theatres for a period of years without regard to the merits of the licensor's product and thus prevents other distributors from competing for that playing time upon the merits of such films as they may have available during those years. It also commits a substantial part of the film supply to the circuit's theatres without any consideration of the merits of competing theatres as outlets for the product. It is difficult to see how a more obviously unreasonable restraint of trade in films could be created by agreement.

Both Universal and Columbia habitually made franchises with affiliates of the major defendants and large independent circuits which had the trade-restraining purpose and effects explicitly found below (R. 3681-3682). This finding is supported by the provisions of the franchises in evidence made by Columbia and Universal, which are digested at App. pp. 86-87, 103-105, 109-110, 118-119, and 127-131.<sup>20</sup>

<sup>20</sup> Both Columbia and Universal had franchises current at the time of the trial covering numerous theatres affiliated with the major defendants. The franchises themselves were

As already noted, the unreasonable purpose and effect of these agreements is unquestioned by the affiliated exhibitor parties and Columbia has also assigned no error to the finding of this purpose and effect by the court below (conclusion 8 (d), (e), (f), R. 3692-3693). Columbia apparently insists that franchises are not agreements which are not offered in evidence; they are, however, listed in Exs. C-9a and U-2, respectively, from which the following summary is taken:

## COLUMBIA

Exhibitor	Affiliated defendants	Number theatres covered	Seasons covered
Lucas & Jenkins	Paramount	85	1943-46
Publix Comerford	Paramount	46	1944-46
Publix Comerford	Paramount	11	1944-46
Publix Kinsey	Paramount	51	1944-46
Publix Great States	Paramount	32	1944-46
Jefferson Amusement Co.	Paramount	27	1944-46
Lightman Circuit	Paramount	49	1943-46
Publix Netco	Paramount	4	1944-46
Notopoulos	Paramount	5	1944-46
Intermountain	Paramount	6	1943-46
Publix (Huerfano Perry)	Paramount	5	1944-46
Total theatres affiliated with Paramount		321	
Randforce	RKO	33	1944-46
RKO	RKO	21	1944-47
Total theatres affiliated with RKO		54	
National Theatres	Fox	45	1944-46
Total theatres affiliated with Fox		45	
Loew (except N. Y.)	Loew	15	1944-46
Loew (N. Y.)	Loew	64	1944-46
Total theatres affiliated with Loew		79	
Warner (except N. Y.)	Warner	201	1943-46
Warner (N. Y.)	Warner	29	1944-46
Total theatres affiliated with Warner		330	

Total affiliated theatres covered by current Columbia franchises, 829.

Footnote concluded on following page.

intended to tie a group of copyrights together for a trade-restraining purpose, but this effect is apparent from the face of such agreements, as noted above. Universal does not appear to deny the unreasonable competitive effects of these franchises, but complains that the court's judgment prevents it from making other franchises with small independents for the purpose of enabling them to compete with affiliated and large independent circuits. Their complaint, like Paramount's against block booking, is really that the relief against franchises was too broad, rather than entirely unwarranted, and it is therefore discussed in Section II, *infra*.

The argument of both Columbia and Universal as to the legality of tying one copyright to another in licensing agreements covering a single

## UNIVERSAL

Northio Theatre Corp. (4 separate licenses)	Paramount	4	1944-48
Northio Theatre Corp. (5 separate licenses)	Paramount	5	1944-48
Total situations affiliated with Paramount		9	
Fox Midwest	Fox	59	1944-48
Fox West Coast	Fox	133	1944-48
Fox Evergreen	Fox	11	1944-48
Fox Wisconsin	Fox	43	1944-48
Total situations affiliated with Fox		248	
Skouras Circuit	RKO	80	1944-47
B. F. Keith Corp.	RKO	31	1944-47
Total situations affiliated with RKO		101	
Warner Bros.	Warner	297	1944-47
Total situations affiliated with Warner		297	

Total affiliated situations covered by current Universal franchises, 655.

season or less also seems to be primarily directed at the form of the judgment rather than the finding that they had engaged in such a practice. Montague and Scully, the respective sales managers of Columbia and Universal, conceded that their general practice was to license in a single block as much of their season's product as they could and that the films were priced and the customers selected in accordance with this policy (R. 1313-1314, 1470). Their counsel also insist that this method of licensing is necessary to supply a relatively stable market for their product. Their block booking practice, of course, could not accomplish that end unless exhibitors were actually induced by this practice to make licenses for films which they did not particularly desire as a means of securing more valuable films that they had to have for profitable operation.<sup>20a</sup>

<sup>20a</sup> Under the standard block booking practice followed by Columbia and Universal, the exhibitor commits himself to take a group of films not yet produced or copyrighted—he often buys nothing more than the assurance that a well-known star will appear in a proposed picture. Under such circumstances, it has been recognized that the dramatic material involved in films makes a relatively small contribution to the total revenue received from the film. *Sheldon v. Metro-Goldwyn Corporation*, 309 U. S. 390. Thus, the restraint which occurs by reason of his commitment to take a block of proposed films occurs prior to and is not related to the copyright to be secured upon the films when produced. Clearly, therefore, it would not be justified by reason of the Copyright Act—whatever restraints might lawfully be imposed after the issuance of a copyright, which, in any event, includes no tying privilege. In block booking the restraint is the cause, rather than the result, of the copyright.

Thus there is a serious dispute only as to the extent to which these defendants actually insisted upon the licensing of exhibition rights under one copyright as a condition of licensing similar rights in another and as to the form of the relief. There is no doubt, that the practice condemned by the court was actually used by these defendants in the conduct of their business, and the real issue raised by their appeals as to block booking, as it is with respect to franchises, is simply whether or not the relief granted against them was broader than necessary. We shall show in Point II, *infra*, that it was not.

2. *Universal and United Artists violated the Sherman Act by making master agreements.*—As we have already shown, the argument of all of the defendants, except Universal and United Artists, assumes that they have made master agreements in the past which unreasonably restrain trade and that the relief granted against a repetition of this practice in the judgment below was proper. We shall show here that both United Artists and Universal have made master agreements which had the trade-restraining effects condemned by the court below, and we shall show in Point II, *infra*, that the relief granted in this respect was proper.

A master agreement differs from a franchise in that it may apply to the exhibition of only a single feature, and both forms of agreement are

commonly used in dealing with theatre circuits. Both frequently license exhibition rights in a large number of theatres upon rental terms which bear no relation to the competitive merits of the theatres in which the particular runs licensed are to be exhibited. A master agreement, by its blanket film rental, prevents any comparison of competitive offers of a particular theatre for a particular run because it completely obscures the terms on which any particular theatre it covers is licensed. It thus arbitrarily prevents consideration of competing offers for the exhibition privileges embodied in the license, and thus unreasonably restrains the competition of exhibitors for the privilege of licensing the picture or pictures covered.

The franchise made by Universal, discussed above, was also in form a master agreement which took no more account of the diverse merits of the numerous theatres it covered than of the copyrights included. Master agreements in evidence made by United Artists, which show on their face similar trade-restraining effects are Exs. 270, 270A, App. pp. 112-113; Ex. 273, App. p. 116; Ex. 383, App. p. 117; Ex. 476, App. pp. 134-136. According to its interrogatory answers 6 through 11 (Ex. 369, R. 346), United Artists was unable to supply film rentals received for specific runs li-

censed to Warner Bros., Fox, and a number of Paramount affiliates,<sup>21</sup> because their master deals made no allocation of the blanket film rental involved to any of the theatres covered. Thus there is no serious dispute that either of these defendants engaged in the practices which the court found to violate the Act or that those practices had the trade-restraining effects which the court found.

## II

The prohibitions of which the defendants complain are, except for competitive bidding, the kind traditionally used to prevent similar Sherman Act violations

A. The principal relief granted against the major defendants is sustained by the findings which their appeals assume to be valid

The brief of each major defendant assumes that it should be subject to a decree which will regulate its individual power both as a distributor and exhibitor to discriminate against others. The only differences among them concern the form that such regulation should take. Four of the major defendants do not object to the competitive bidding provisions of the judgment. While Paramount does object to competitive bidding as an appropriate means of such regulation, it suggests instead an injunction against an arbitrary refusal to license a run sought by an independent

<sup>21</sup> Interstate Circuit, Balaban & Katz, Tri-States Circuit, Kincey, and Florida Theatres, Inc., also known as the Sparks Circuit (R. 939).

exhibitor as an appropriate substitute.<sup>22</sup> Their dispute with the Government, in so far as their continuing individual power to discriminate is concerned, is thus largely confined to the form of the remedy.

The major defendants' appeals thus assume, as the court below found, that their power to discriminate against others has been abused in the past in a manner which violates the Act and will be so abused in the future unless a decree adequate to eliminate such abuse is entered in this suit.

While they all deny that this continuing power to discriminate is inherent in their theatre ownership, and they deny that such ownership is itself a violation of the Sherman Act, it is difficult to rationalize upon any other basis their assumption that judicial regulation in this suit is an appropriate means of dealing with their individual power to discriminate. They insist that they have been guilty of no conspiracy to violate the Act and that they have achieved no film monopoly of

<sup>22</sup> Paragraph 9 of Section II of the judgment (R. 3698) is modeled after a provision proposed by all of the major defendants below (R. 3624-26) and was apparently adopted by the court as an appropriate supplement to the competitive bidding relief specified in paragraph 8 of this Section. The standards which determine whether or not the defendants' refusal is arbitrary are apparently those spelled out in paragraph 8.

any kind. Thus the threat of monopoly inherent in the continuing power and incentive which their theatre ownership gives them to discriminate against others is the only conceivable basis for the relief they assume to be appropriate. Any judgment now entered in this suit is one which may only have for its basis an appropriate finding of Sherman Act violation, and their dual concession, for the purposes of their appeals, that their individual power to discriminate against competitors has been illegally abused and that such power should be continuously regulated by an appropriate decree in this case, suggests a frank recognition by them that its continuing possession by them carries with it a continuous threat of future discriminatory conduct.

All of the majors challenge the findings of a horizontal price-fixing conspiracy among them and other distributors and exhibitors, and a conspiracy between each of them and their exhibitor licensees arising out of their individual price-fixing practice. Yet the appeal of each assumes, as noted above, that it has made license agreements with exhibitors affiliated with other defendants and with other large circuits which, individually considered, violated the Sherman Act, and these agreements include agreements to impose unreasonable clearance against their independent competitors. Since this unreasonable clearance was itself a means of controlling admission price competition between exhibitors in such a way as

to protect arbitrarily the affiliated theatre and was established by agreement between two defendants in each case, the challenge to the findings of general conspiracy have a very limited significance insofar as the major defendants are concerned. The findings of concerted action which were broader than mere agreements between two defendants, affect only the validity of relief intended to end the industry-wide conspiracies. Relief required to prevent concerted action in violation of the Act by any one defendant and another defendant, or exhibitor affiliated with it, is supported by the findings not appealed from.

The prohibitions against price-fixing and against systems of clearance (R. 3695-3696), which all of the defendants except Columbia attack, were plainly necessary to prevent continuance of the precise individual illegal conduct in which each distributor was found to have engaged, as well as to prevent the more general conspiracies to which they were all found to be parties. The propriety of these provisions of the judgment as to the major defendants is therefore supported by the findings of individual illegal conduct which they do not attack, as well as the more general findings of conspiracy which they do attack.

The major defendants still insist that they be allowed to continue stipulating minimum admission price restrictions in their license agreements and maintain systems of clearance while they continue to retain and expand theatre holdings

acquired and maintained through a discriminatory use of such restrictions. They not only wish to be free, as the present judgment leaves them free, to fix admission prices in their own theatres in a manner which will most effectively control the competition of others, but they apparently desire to make such control even more effective by agreeing with other exhibitors as to the minimum prices they may charge. Each also apparently desires to continue the privilege of using clearance as a systematic means of controlling by agreement the relative playing positions of all competing theatres which play their films. These contentions add up to a candid admission of a common desire to continue the precise trade restraints found below with the benefit of a legal sanction to be created by what they regard as an appropriate judgment in this suit.

Universal and United Artists have joined in the majors' attack upon these provisions of the judgment upon somewhat different grounds, but their attack is also without merit since, as shown in Point I, A, *supra*, they made the same kind of film licenses with affiliated licensees for precisely the same trade-restraining purposes as the major defendants did. These provisions of the judgment are so obviously necessary to enjoin continuing restraints of the kind shown in Point I, A, to violate the Sherman Act, that no further discussion of their propriety is required here. In the ensuing discussion we shall deal first with the pro-

visions requiring the distributor-defendants to justify any clearance agreement made in the future as "reasonably necessary to protect the licensee," the prohibition against the major defendants' theatre expansion, and the termination of the arbitration system, since the attack on those provisions is common to all of the major defendants. We shall then show that the provisions against franchises, block booking, and master agreements, attacked principally by the three non-exhibitor defendants, were also proper.

B. The court was justified in making the defendants' clearance agreements *prima facie* invalid and imposing the burden of showing that such a restriction is reasonable upon the distributor granting it

Each of the defendants was correctly found to have habitually made both an individual and collective trade-restraining use of clearance agreements as shown in Point I, A, *supra*. The court might, therefore, within existing precedents, have prohibited them from making any such agreements at all for a substantial period of time, even if such agreements were otherwise lawful. *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 724. Instead the court merely made such agreements *prima facie* invalid, and cast the burden of justifying the reasonableness of the restriction in question upon the distributor granting it (R. 3695-96). These provisions are attacked directly only by United Artists and Universal, but the major defendants insist that the presumption established by the judgment should not be regarded

as one of illegality and that a particular clearance may be justified as reasonable by showing that it was necessary to assure "a reasonable return" to the licensor as well as by showing that it was "reasonably necessary to protect the licensee." So construed these provisions are unobjectionable to them (Warner brief, pp. 123-124), but are wholly objectionable to the Government.

Since the major defendants are both distributors and theatre owners, they apparently desire a flexible standard by which they can justify the reasonableness of clearance granted by other distributors in favor of their theatres in terms of the needs of those theatres, and at the same time justify the restrictions they impose against independent exhibitors in terms of the necessity of protecting their film rental as distributors. Cf. *Interstate Circuit v. United States*, 306 U. S. 208, 211-212. As shown in our main brief, prohibitions controlling the form and character of the defendants' license agreements with affiliated theatres cannot prevent continuance or recurrence of the conspiracies and discriminations found below, since such restrictions may and probably would be continued simply by the manner in which positive prints were made available to affiliated theatres and theatres competing with them, even if clearance agreements were prohibited. However, these provisions should effectively prevent the continued use of clearance by the defendants to protect large unaffiliated

circuits from the competition of smaller independents. The court's judgment of *prima facie* invalidity would compel the distributor to justify any clearance granted in terms of protection to the licensee regarded as reasonable by Sherman Act standards.<sup>23</sup> The restriction would have to be justified by the party in the best position to know its competitive effects and the justification would have to be in terms of an especial need by the licensee for the competitive advantages which such restriction affords. If such a need were determined by Sherman Act standards, such an advantage would have to be shown as essential to the licensee's ability to compete rather than simply a restriction of the competition of others which might seem desirable to the licensee and to the distributor.

We think it is clear, therefore, that the clearance prohibitions now embodied in the judgment are no broader than the illegal licensing restrictions employed by the distributor defendants require. As pointed out in our main brief, an assured termination of such restrictions may only be had by divorcement and cross-licensing relief.

<sup>23</sup> It should be noted that the consent decree standards which the court stated in its opinion might control the determination of reasonable clearance in the future R. (3533-34) were not embodied in the final judgment. By its action in this connection the trial court recognized the validity of the Government's arguments at the hearing on the judgment that the consent decree standards were wholly inadequate to prevent the use of clearance in a manner which would violate the Sherman Act.

C. The prohibition against theatre expansion in the judgment below was a less drastic provision than the major defendants' violations warranted.

As we have already shown, the major defendants have virtually conceded the existence of a continuing power and incentive to discriminate against competitors which inheres in their continued ownership of any theatres. As pointed out in our main brief,<sup>24</sup> the proper remedy for such a Sherman Act violation is not mere regulation, but its complete termination. However, if a prohibition against theatre expansion, rather than affirmative theatre divestiture, is thought to be a proper remedy for the attempts to monopolize found below (R. 3692-93),<sup>25</sup> an unqualified prohibition against theatre expansion was certainly the minimum relief required.

<sup>24</sup> For an additional analysis of the economic power inherent in this integration see HUETTIG, *ECONOMIC CONTROL, MOTION PICTURE INDUSTRY*, Univ. of Pa. Press, 1944.

<sup>25</sup> The court's failure to find actual monopolization was apparently a consequence of its assumption that since no one of the eight distributor-defendants controlled another through stock ownership, their businesses could not be aggregated in determining whether their domination of the market had reached monopoly proportions. This assumption was erroneous in view of the exclusionary nature of the conspiracy which bound them together. Having made concerted use of their power to exclude competitors, they were in no position to insist that the power to exclude possessed by each should be separately evaluated. In *American Tobacco Co. v. United States*, 328 U. S. 781, this Court expressly sanctioned aggregating the business of the three major tobacco companies for the purpose of determining whether or not they had actually monopolized the tobacco business in viola-

It was made clear in the course of the argument below that the existing provision does not even require court approval of mere replacement of existing theatres lost or abandoned (R. 3108-3109).

What each major defendant seeks here is the power to expand its theatre business "in order to protect its investments or in order to enter a competitive field."<sup>26</sup> While they are willing to subject their new acquisitions to court approval, they apparently believe such approval could be obtained for establishing an affiliated theatre in any

tion of section 2 of the Sherman Act. There, as here, no one of them did enough business to give it alone a monopoly position, but there, as here, they were all found to have engaged in an exclusionary price-fixing conspiracy. The exclusionary effect here is simply illustrated by the fact that Columbia, which licensed more independent theatres on first run in cities over 100,000 than any other defendant (see App. p. 303) had fewer independent first run accounts in 1945 than it had in 1936 in those cities and in all cities over 25,000 (Exs. C-6, R. 1281, C-7, App. 318-326), notwithstanding an increase from 1935 to 1945 of more than 4,000 in the number of independent theatres (R. 3688).

The lower court was thus clearly wrong in its conclusion of no actual monopolization and our assignment of error to that conclusion should be sustained. Whether or not the court below was right or wrong in this ultimate conclusion does not, in our opinion, affect our right to the relief we seek. The findings of conspiracy and attempted monopolization, in the manner described in the subsidiary findings, are themselves sufficient to require divorcement and a ban on cross-licensing, since, as pointed out in our main brief, relief short of such measures cannot terminate the conspiracies or attempts to monopolize arising from the continued vertical integrations.

<sup>26</sup> See Warner brief p. 32.

location where the independents may prove reluctant to show the films of a major upon terms which seem desirable to it.<sup>27</sup> This was, of course, precisely the form of activity which led to the creation of the numerous theatre pools condemned by the court below and discussed in Point I, B, *supra*.

The defendants also suggest that the Government has already given the existing judgment an unreasonable construction by suggesting that a civil contempt proceeding brought against Fox by an independent exhibitor<sup>28</sup> was justified. In that proceeding the petitioner charged that when it sought to build a new theatre in Watsonville, California, a Fox closed town, Fox commenced construction of a new theatre there for the purpose of preventing completion of petitioner's theatre. Although the construction of the new Fox theatre would mean possession by it of three theatres in a town where it now has only two, Fox claims that this is not expansion because the new theatre is intended merely to replace an obsolete one which Fox plans later to abandon. The obsolete theatre was apparently retained in that condition on the theory that even such a theatre may be useful in keeping a closed town closed.<sup>29</sup> If, as the court below intended through its judgment, an

<sup>27</sup> See RKO brief, p. 54.

<sup>28</sup> See RKO brief, p. 53.

<sup>29</sup> Cf. situation at Lockport, New York. Brief for the United States in *Schine Chain Theatres, Inc. et al. v. United States*, No. 10, this Term, p. 78.

independent could compete with Fox for films, it would plainly be desirable for Fox to have a new theatre wherever new independent competition threatens to materialize. The contempt proceeding was dismissed below without a decision on the merits upon the ground that the petitioner did not have standing to maintain it, and we need not be concerned with its merits here.<sup>30</sup> However, its institution foreshadows a continuous litigation in this suit of justifications asserted by the defendants for specific theatre acquisitions unless such acquisitions are prohibited in unqualified terms.

The basis for prohibiting acquisitions by the major defendants in this suit is not, as they seem to assume, the mere possession by them of large theatre circuits involved in past illegal activity. The qualifications in the prohibitions against theatre acquisitions included in the *Schine* and *Crescent* judgments were plainly justified by the limited nature of their control over the film business. There is no occasion for any comparable qualification here, since acquisition by these defendants is enjoined not simply because of their dominating position and past illegal conduct as theatre operators, but because of the added power and incentive to discriminate which necessarily results from expanding the extent of their vertical integration. We submit that the

<sup>30</sup> See opinion filed on Jan. 20, 1948, by Judge Bright, re petition filed in this suit by *New Salinas Theatres, Inc. v. Twentieth Century-Fox Film Corp., et al.*, No. 266, S. D. N. Y.

only abuse of discretion involved in the court's prohibition against expansion was the exception it made in favor of acquisition by the defendants of independent pooled interests which we show to be unwarranted at pages 115-119 of our main brief.

**D. The court properly terminated the arbitration established by the consent decree**

No serious argument is made by any defendant that the court had power to continue the arbitration system established by the consent decree without the continuing consent of the Government. The suggestion that the arbitration system was not terminable as of right at the expiration of the three-year trial period needs no consideration, since even if it were assumed that a hearing, evidence, and judgment were required, the trial, findings, and judgment below were certainly adequate for this purpose. The consent decree was, of course, terminated because it was found inadequate to deal with the violations found. The arbitration system had no separate purpose or excuse for existence apart from this decree and was therefore necessarily terminated with it.

As shown in Part I, C of our main brief, trade practice arbitration is a form of regulation utterly inconsistent with the remedies essential to the effective elimination of the violations of law in this industry and now sought by the Government.

The cases relied on by the defendants for the proposition that Sherman Act decrees must necessarily be hand tailored in each case do not suggest that they must be hand tailored to the requirements of the principal defendants rather than to the necessities of law enforcement.<sup>31</sup> The fact that the five major defendants are willing and anxious to maintain such a system at their expense suggests that it has a special value for them that it does not have for general purposes of Sherman Act enforcement.

E. The prohibitions against block booking, franchises, and master agreements were no broader than required to terminate the violations found

Paramount, Columbia, and Universal are the only defendants which attack the prohibition against block booking (R. 3696).<sup>32</sup> Only Universal and United Artists attack the prohibitions against franchises and master agreements (R. 3696). While the block booking injunction presents a difficult enforcement problem in view of the intangible means by which one film may be used to force a license for another owned by the same distributor, the form of this injunction is the only one consistent with its purpose. The evidence did not suggest that the tying of only two copyrights together for licensing purposes would necessarily have an insignificant trade-restraining effect,

<sup>31</sup> See Fox brief, p. 41.

<sup>32</sup> It does not apply to United Artists.

since a single copyright may represent a distribution business worth several million dollars. See App. pp. 260-261. In this circumstance a finding of law violation by extensive use of tying film copyrights together for trade-restraining purposes in the past, even though generally found in the form of seasonal agreements or franchises, required a prohibition against tying any two or more to give assurance against similar future violations.

The prohibitions against franchises and master agreements are directed at a very narrow aspect of trade-restraining conduct since they control only a specific form of license in each case. Nevertheless, these prohibitions serve to define the standards of conduct required of the distributor-defendants in the future and they thus serve a useful purpose.

United Artists' attack on the franchise provision is wholly academic since it says it has no present desire to employ such an agreement. Its attack on the master agreement prohibition, of course, is dependent upon a showing that the master agreements admittedly made by it had no trade-restraining effect, and it is unable to make this showing since, as pointed out at pages 47, 48, *supra*, they have such effects on their face.

Universal does not seriously dispute the illegality of either the franchises or master agreements it has made with other defendants and their affiliated exhibitors, but argues that it should be permitted to make franchises with independent

exhibitors in order to let them compete with large circuits and that it should be permitted thus to establish semi-permanent outlets by contract comparable to those affiliated with the major defendants by stock ownership.

The short answer to the contentions of both these defendants is that if either can show in the future that it has so completely reformed its licensing practice that such prohibitions are no longer appropriate, it may secure a modification of the injunction from the district court. See *International Salt Co. v. United States*, No. 46, this Term.

A practical objection common to all three non-exhibitor defendants to abolition of block booking, franchises, and master agreements, and the institution of the competitive bidding system on a theatre by theatre, picture by picture basis, is an asserted need to engage in the prohibited practices as a means of business survival. They assert that block booking, master agreements, and franchises are the only means they have of forcing their pictures into the preferred channels of distribution which are at all comparable to the major defendants' theatre affiliations. Therefore, they argue, they must use these devices in order to compete with the major defendants.

We do not dispute the soundness of this argument in so far as it is based upon an economic necessity arising from competing in a market dominated by the major defendants instead of

conspiring with them. We do deny their assumption that antitrust violations by some members of an industry must be countenanced because they result from more basic violations by other members. See *United States v. Crescent Amusement Co.*, 323 U. S. 173. As shown in our main brief, the only appropriate solution of their dilemma is the divestiture of the major defendants' theatres rather than a permissive use by these distributors of trade-restraining devices intended to counter-balance that control. The relief granted by the trial court against the use of these devices, while perhaps of doubtful enforceability so long as the relief sought by the Government against the major distributors is withheld, was certainly appropriate to deal with violations of this kind in so far as they may be prohibited at all by injunctive relief.

### III

**Appellant-intervenors are not entitled to intervention of right below or here to litigate the form of the final judgment**

In Nos. 85 and 86, certain exhibitor groups<sup>33</sup> appeal from orders below denying their motions for leave to intervene (R. 3718). These groups

<sup>33</sup> Appellant-intervenors in No. 85 are two exhibitor associations and a number of independent exhibitors. Most of the members of the associations are independent exhibitors, but some are affiliated with the defendants. It is specifically alleged that one association does not represent the interests of its affiliated exhibitors in this case, and that no part of the

also have filed original motions for leave to intervene in this Court in Nos. 79-84. The five major defendants moved to dismiss the appeals in Nos. 85 and 86. On June 23, 1947, this Court postponed consideration of the original motions to intervene and of jurisdiction to hear the appeals until hearing of the cases on their merits (R. 3840-3841).

In both instances, appellant-intervenors seek to attack the competitive bidding provisions of the decree below. They claim intervention of right under Rule 24 (a) (2) of the Federal Rules of Civil Procedure (28 U. S. C., following Sec. 723c). They assert that they are or may be "bound by a judgment in the action" on the theory that an agreement among defendants to conform to the competitive bidding system would be an antitrust violation for which they could sue, but that the lower court's decree directing such a system insulates the defendants from such actions. They contend that present representation of their interests "is or may be inadequate" because the Government does not actively oppose competitive

expense will be borne by them. There are no such allegations with respect to the other association. (R. 3565-3567.)

Appellant-intervenors in No. 86 are a number of independent exhibitors. Their application is supported by exhibitor associations, some of whose members are affiliated with the defendants. While no defendant-owned theatres are contributing to the expense of the application, theatres held jointly by independents with defendant Paramount are making such contributions. (R. 3582-3583.)

bidding, and the defendants who attack it (Paramount, Columbia, Universal and United Artists) have interests opposed to theirs.

We do not object to appellant-intervenors' being heard here as friends of the Court. We did not object below, and they were fully heard there. We are impelled to object, however, to their becoming parties to litigate the form of the final judgment since we are of the view that they fail to meet the requirements for intervention of right.

The appellant-intervenors are in error when they say that the Government does not actively oppose the competitive bidding system. The Government has assigned error to it, and argues in its main brief (pp. 54-89) that the system is so inadequate as to amount to an abuse of discretion. We do not, of course, claim to give specific representation to the purely private interests of appellant-intervenors. Our purpose is the larger one of protecting the public interest in free competition. But that also is the scope of this suit. Thus, insofar as this action is concerned, appellant-intervenors' interests are being adequately represented. Cf. *In re Engethard*, 231 U. S. 646, 651; *New York City v. New York Tel. Co.*, 261 U. S. 312, 316; *Ex parte Leaf Tobacco Board of Trade*, 222 U. S. 578.

Since these appellant-intervenors in any event may be fully heard as to the form of the judg-

ment, the requested intervention would serve no useful purpose. The appellant-intervenors' standing in this respect is no different from that of thousands of other exhibitors. In any anti-trust case of this magnitude members of the industry and of the public may be sufficiently interested to want to present their views. A number of such persons have presented their views in this case as friends of the court. To permit intervention as parties by all such persons would expand the controversy beyond all reasonable bounds, to the prejudice of both the Government and the court. Cf. *Allen Co. v. Cash Register Co.*, 322 U. S. 137, 141-142.

Since appellant-intervenors are not entitled to intervention of right, this Court lacks jurisdiction to set aside the denials below in the absence of an abuse of discretion. *Brotherhood of Railroad Trainmen v. B. O. R. Co.*, 331 U. S. 519, 524-525; *United States v. California Canneries*, 279 U. S. 553, 556, and cases cited. Appellant-intervenors do not assert such an abuse of discretion, and clearly there was none. Consequently, this Court should dismiss the appeals and deny the original motions to intervene here.

#### CONCLUSION

The judgment of Sherman Act violations should be affirmed as to all defendants and the injunc-

tive provisions sustained except as modified by the relief sought upon the Government's appeal.

Respectfully submitted,

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FEBRUARY 1948.